

CHRISTOPHER FANESTIL
Claimant

AFFORDABLE IMPROVEMENTS

Respondent

UNKNOWN Insurance Carrier

WORKERS' COMPENSATION FUND

ORDER

ISSUES

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant testified that in late June 2000 he was at a temporary employment agency when he was approached by the respondent's owner and offered a job cutting branches and trees that had been damaged in a storm. Respondent provided the tools and transportation to the job site where claimant worked the entire day. Respondent paid the claimant \$50 for approximately 7 hours of work.

On July 20, 2000, the respondent's owner, accompanied by two other workers, contacted the claimant at his apartment and asked the claimant to work with the crew the next day on a painting job. Claimant was advised that respondent's people would pick him up the following morning.

The claimant was picked up the next morning, July 21, 2000, by the co-workers and transported to the job site in Augusta, Kansas. The claimant was in the process of painting the trim on the house when he slipped and fell from the ladder. The claimant did not realize the extent of his injuries but was in pain and had a co-worker drive him home. The following day the claimant was taken by ambulance to the emergency room at Wesley Hospital. X-rays confirmed that claimant had sustained a broken right foot in the fall.

The claimant testified that the hospital contacted the respondent's owner who denied that claimant was working for him and further denied claimant was at the job site.

Ray DeSylva, the respondent's owner, testified that he was a general contractor and that he had subcontracted the painting of the house. It was his contention that claimant was an employee of the subcontractor. Mr. DeSylva further testified that during the year 2000 he did not have a payroll of \$20,000 because he did not have any employees.

Initially, the Fund contends that the parties are not covered by the workers compensation act because respondent did not have a payroll of \$20,000.

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends. *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990). Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in K.S.A. 44-505(a). *Brooks v. Lochner Builders, Inc.*, 5 Kan. App.2d 152, 613 P.2d 389 (1980). The pertinent provisions of K.S.A. 44-505(a) provide as follows:

. . . the workers compensation act shall apply to all employments wherein employers employ employees within this state except . . .

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such

employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, . . . ;

Although the respondent denied having any employees or a payroll, the claimant's testimony established that not only had the respondent hired him on two separate occasions, but that there were other workers present at both job sites. The claimant testified that a co-worker the claimant had worked with on the tree trimming job stated he had worked for respondent on numerous jobs and claimant believed there was an employee and employer relationship. Claimant further testified that he was never told that anybody was a subcontractor or that he was working for a subcontractor.

The claimant's uncontradicted testimony was that Ray DeSylva, respondent's owner, had personally hired and paid him. The claimant further testified that the same vehicle and equipment was used both times he worked for respondent. The claimant's testimony establishes that he was hired by respondent and that respondent did in fact have other employees.

Conversely, the respondent was evasive and could not name the subcontractor that was purported to have the painting job where claimant was injured. Moreover, the respondent was less than forthcoming providing any requested documentation. The Administrative Law Judge obviously found the claimant to be a credible witness and accepted his version of events. The Board generally defers to the Administrative Law Judge's assessment of the credibility of witnesses who have testified before the Administrative Law Judge. After reviewing the record, the Board concludes it is reasonable to do so in this case and, therefore, affirms the Administrative Law Judge's decision that claimant was an employee of respondent and that respondent had other employees.

The intent of the legislature is that the provisions of the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act.¹ Based on several factors including the claimant's rate of pay, the fact that respondent had other paid employees, and the evidence of the job contracts that respondent had entered it may reasonably be estimated the respondent would have a gross annual payroll of more than \$20,000 for all employees. The claimant has met his burden of proof to establish that respondent had the requisite payroll to be covered by the Act.

The Fund contends that claimant did not provide respondent with timely notice of the accident. Although claimant stated that he did not notify the respondent, he testified that the hospital notified the respondent whereupon the respondent denied claimant was an employee at the job site. The Administrative Law Judge correctly determined that respondent was provided timely notice.

¹K.S.A. 44-501(g).

The Fund, in the application for review, raised the issue of insolvency. The issue was not briefed by the Fund. On review from a preliminary hearing, a jurisdictional issue listed in K.S.A. 44-534a must be raised or an allegation made that the Administrative Law Judge has exceeded his jurisdiction. The Administrative Law Judge has jurisdiction to find respondent to be insolvent and order the benefits paid by the Fund. K.S.A. 44-532a. The finding on this issue, even if it were erroneous, would not exceed the Administrative Law Judge's jurisdiction. Because this finding does not exceed the Administrative Law Judge's jurisdiction and it is not one which is subject to review under K.S.A. 44-534a relating to preliminary hearings, the Board lacks the authority and jurisdiction to review the Administrative Law Judge's determination of respondent's insolvency.

In addition, the Administrative Law Judge has jurisdiction to determine the amount of temporary total disability compensation which requires a finding of the average weekly wage. Such determination is not subject to review under K.S.A. 44-534a relating to preliminary hearings and the Board lacks the authority and jurisdiction to review that determination by the Administrative Law Judge.

As provided by the Act, preliminary findings are not binding but subject to modification upon a full hearing on the claim.²

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated March 6, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2001.

BOARD MEMBER

pc: W. Walter Craig, Claimant's Attorney, Wichita, Kansas
Ray DeSylva, DBA Affordable Improvements, Respondent, Wichita, Kansas
E. L. Lee Kinch, W.C. Fund's Attorney, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

²K.S.A. 44-534a(a)(2).